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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
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14 _____
15 MIGUEL HERNANDEZ-JIMENEZ,

16 Petitioner,

17 v.

18 UNITED STATES OF AMERICA

19 _____
20 Respondent.

)
)
) Cr. No. 12-4718GT
) Cv. No. 13-0790GT
)

) **ORDER**
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)
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21 On April 2, 2013, Petitioner, Migual Hernandez-Jimenez (“Mr. Hernandez”), filed a Motion
22 to Modify Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Hernandez requests a two level
23 downward departure based on his status as a deportable alien, which Mr. Hernandez asserts “should
24 have been considered as a mitigating factor” at his sentencing. The Court has fully considered this
25 matter, including a review of Mr. Hernandez’s brief filed, the authorities cited therein and the
26 arguments presented. For the reasons stated below, Mr. Hernandez’s Motion to Modify Sentence
27 is **DENIED**.

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1 First, Mr. Hernandez pled guilty, pursuant to a written plea agreement, to one count of illegal
 2 Removed Alien Found in the United States, in violation of 8 U.S.C. § 1326(a) and (b). In the
 3 written plea agreement, Mr. Hernandez explicitly waived his right to appeal and/or collaterally
 4 attack his conviction or sentence. The Ninth Circuit has long acknowledged that the terms of a plea
 5 agreement are enforceable. *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996),
 6 *cert. denied*, 117 S.Ct. 1282 (1997). Since Mr. Hernandez expressly waived his statutory right to
 7 appeal or collaterally attack his sentence in his plea agreement, Mr. Hernandez is now precluded
 8 from challenging that sentence pursuant to 28 U.S.C. § 2255. *See, United States v. Abarca*, 985
 9 F.2d 1012, 1014 (9th Cir. 1993) (holding that a knowing and voluntary waiver of a statutory right
 10 is enforceable).

11 Moreover, even if Mr. Hernandez had not expressly waived his right to appeal or collaterally
 12 attack his sentence, his petition would still fail. In essence, Mr. Hernandez argues that because of
 13 his status as a deportable alien, he is "ineligible[]" for pre-release custody and minimum security
 14 confinement." Mr. Hernandez argues that the Court should grant him a two level downward
 15 departure because of his status. However, Mr. Hernandez's argument that the Court should depart
 16 downward because he is a deportable alien is precluded by statute and current Ninth Circuit case
 17 law. By statute, the Court may depart downward only if there are "aggravating or mitigating
 18 circumstances . . . not adequately taken into consideration by the Sentencing Commission." 18
 19 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that the threat of deportation is not a
 20 factor that the district court may consider for sentencing purposes. *United States v. Alvarez-*
 21 *Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990).¹ Accordingly,

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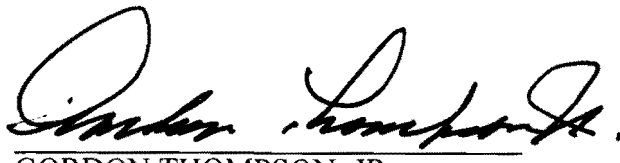
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 26 ¹ The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Limon, was not
 27 entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as a
 28 deportable alien he is not eligible to spend the last six months of his sentence in a half way
 house pursuant to 18 U.S.C. § 3624(c). *See United States v. Zepeda-Valles*, 87 F.3d 1325 (9th
 Cir. 1996).

1 **IT IS ORDERED** that Mr. Hernandez's Motion to Modify Sentence is **DENIED**.

2 **IT IS SO ORDERED.**

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4
5 1-9-15
6 date

7 
8 GORDON THOMPSON, JR.
9 United States District Judge

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cc: AUSA Bruce Castetter

Petitioner